No. .....

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1944

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KING COUNTY, a municipal corporation, and RALPH S. STACY, as County Assessor of King County, Washington, and CARROLL CARTER, as County Treasurer of King County, Washington,

*Petitioners,*

vs.

WASHINGTON CHOCOLATE CO., a corporation,

*Respondent.*

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## BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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### I.

### OPINION OF THE COURT BELOW

The opinion of the Supreme Court of Washington is reported in 121 Washington Decisions 608.

### II.

### JURISDICTION

1. The date of the judgment to be reviewed is November 28, 1944.

2. The statutory provision which is believed to sustain the jurisdiction of the court is Judicial Code, Section 237(b).

3. The facts showing that the nature of the case is

such as to bring it within the jurisdictional provisio relied upon are as follows:

The state statute (Remington's Revised Statutes o Washington §11111) provides for the annual *ad val orem* taxation of all real and personal property. Suc statute was held repugnant to Article I, Section 8 Clause 3 of the Federal Constitution, providing:

> "The Congress shall have the power * * *
>
> "To regulate commerce with foreign nation and among the several states and with the In dian tribes, * * *,"

and repugnant to Article I, Section 10, Clause 2 o the Federal Constitution providing:

> "No state shall, without the consent of th Congress, lay any imposts or duties on imports o exports, except what may be absolutely necessar for executing its inspection laws, * * *."

The petitioners were party to this cause in the Su preme Court of the State of Washington which cour rendered a judgment affirming the decision of the Su perior Court of the State of Washington for Kin County (R. 42).

4. The cases believed to sustain jurisdiction are a follows:

> *Baldwin v. Seelig*, 294 U.S. 511, 79 L. ed 1032;
>
> *McGoldrick v. Berwind-White Coal Minin Co.*, 309 U.S. 33, 84 L. ed. 565.

## III.

## STATEMENT OF THE CASE

A statement of the case is contained in the preced ing Petition, commencing at page 1, and is hereb adopted, and made a part of, this brief.

## IV.

## SPECIFICATION OF ERROR

The Supreme Court of Washington erred in holding that the taxed merchandise was not subject to local *ad valorem* property taxation because it was an import "in the original package," and the tax imposed was therefore repugnant to the provisions of Sections 8 and 10 of Article I of the Constitution of the United States, and in entering judgment invalidating the assessment and enjoining collection of the tax.

## V.

## SUMMARY OF ARGUMENT

### Point A.

**The Federal Constitutional prohibition against the State levying an "impost or duty" on imports does not prohibit the imposition of a non-discriminatory property tax on goods in their original packages, which tax is borne equally by all real and personal property within the State.**

### Point B.

**Where goods are imported from a foreign country by a manufacturer and stored in his warehouse in the original package awaiting processing, the collection of an annual non-discriminatory *ad valorem* property tax does not constitute an "impost or duty," nor does the same interfere with the constitutional power of Congress to regulate commerce with foreign nations.**

## VI.

## ARGUMENT

### Point A.

**The Federal Constitutional prohibition against the State levying an "impost or duty" on imports does not prohibit the imposition of a non-discriminatory property tax on goods in their original packages, which tax is borne equally by all real and personal property within the State.**

The syllogism upon which our argument under this point is based is as follows:

1. Article I, Section 10 of the Federal Constitution provides in part:

> "No State shall * * * lay any imposts or duties on imports * * *."

2. The words "imposts or duties" as used by the framers of the Constitution did not include non-discriminatory *ad valorem* property taxes.

3. Therefore, Article I, Section 10 of the Federal Constitution has no application in the case at bar.

At the outset, it should be noted that the word "taxes" as used in the Federal Constitution means something other and different than "imposts or duties." In Article I, Section 8, the Constitution grants to Congress the power "to lay and collect *taxes, duties, imposts* and *excises.*"

In Article I, Section 9, Congress is prohibited from laying a "*tax* or *duty*" on exportations from any state. *If the framers of the Constitution thought the word "tax" synonymous with "imposts" or "duties," or even "excises," why did they use all four words in Article I, Section 8?*

And again in Article I, Section 9, the authors of the Constitution recognize a distinction between "taxes" and "imposts or duties" by using the words "tax or duty" in prohibiting the collection of either tax or duty on articles exported from any state.

In *Pacific Insurance Co. v. Soule*, 7 Wall. 433, 74 U.S. 433, Mr. Justice Swayne, in discussing the definition intended by the framers of the Constitution for the words "imposts or duties," refers to Judge Tucker's definition that "they were probably intended to comprehend every specie of tax or contribution not included under the ordinary terms 'taxes and excises'." This must clearly be a proper definition, in view of the use of the words "taxes" and "excises" in other provisions of the Constitution.

In *Cooley v. Board of Wardens of the Port of Philadelphia, et al.*, 12 How. 299, 53 U.S. 299, the court recognized the distinction between "duties and imposts" on the one hand, and "pilotage fees" on the other hand, saying:

> "This provision of the Constitution was intended to operate upon subjects actually existing and well understood when the Constitution was formed. Imposts and duties on imports, exports, and tonnage were then known to the commerce of a civilized world to be as distinct from fees and charges for pilotage, and from the penalties by which commercial states enforced their pilot laws, as they were from charges for wharfage or towage, or any other local port charges for services rendered to vessels or cargoes; and to declare that such pilot fees or penalties are embraced within the words imposts or duties on imports, exports or tonnage, would be to confound things

> essentially different, and which must have been known to be actually different by those who used this language. * * *"

Certainly the above cited case recognizes that the words "imposts or duties" have a definite and well known meaning, which is to be taken from the interpretation given by the civilized world at the time of the adoption of the Constitution. The words are not all-inclusive and a "fee for pilotage" is held excluded as should be "taxes and excises."

Sometimes words used in written documents can best be interpreted by a reference to the expressions made by those charged with the writing of the document.

In Volume II of Records of Federal Convention, at p. 442, we find:

> "Mr. Govr. Morris thought the regulation necessary to prevent the Atlantic States from endeavoring to *tax* the Western States—and to promote their interest by opposing the navigation of the Mississippi which would drive the Western people into the arms of G. Britain." (Italics ours)

If the dominant purpose of this provision was as above indicated, the same would not be contravened by a non-discriminatory property tax upon goods which had come to rest in the warehouse of a manufacturer.

In Volume I of Watson, "The Constitution of the United States," at p. 837, we find:

> "Limitations were imposed by the 6th Article of the Articles of Confederation upon the power

> of the States similar to those contained in this clause; and it is probable that most of such limitations were suggested by those in the Articles. *Imposts and duties as here used are synonymous terms, and mean the price paid for the privilege of bringing an article into the country.*" (Italics ours)

We would be less than fair if we did not recognize that the case of *Low v. Austin*, 13 Wall. 29, 80 U.S. 29, while not discussing the theory which we advance, is opposed thereto in the result reached. That was a case wherein the court held a non-discriminatory state property tax repugnant to the Federal Constitution, insofar as it attempted to charge such tax to imports remaining in their original packages. However, this decision blindly follows *Brown v. Maryland* without recognition of the basic difference between the two types of tax exactions involved. In *Brown v. Maryland*, the license fee sought to be collected was upon the right to sell imports, which is in the true sense a "duty or impost," whereas in the *Low* case, the tax was an *ad valorem* property tax laid equally upon all goods receiving the protection of the state. Concerning this difference the court merely says:

> "But the obvious answer to this position is found in the fact, which is, in substance, expressed in the citations made from the opinions of Marshall and Taney, that the goods imported do not lose their character as imports, and become incorporated into the mass of property of the State, until they have passed from the control of the importer or been broken up by him from their original cases. Whilst retaining their character as

> imports, a tax upon them in any shape, is within the constitutional prohibition. * * *"

We think this case poorly considered, because the court assumed, without investigation as to the origin or intended use of the words, that "imposts and duties" included taxes.

*Low v. Austin*, *supra*, was decided in 1872. The Supreme Court of the United States has decided no case since that time involving directly the question of whether a non-discriminatory state property tax was an "impost or duty" on goods remaining in their original packages.

### Point B.

**Where goods are imported from a foreign country by a manufacturer and stored in his warehouse in the original package awaiting processing, the collection of an annual non-discriminatory *ad valorem* property tax does not constitute an "impost or duty," nor does the same interfere with the constitutional power of Congress to regulate commerce with foreign nations.**

If, as we have contended under Point A herein, the tax attempted to be collected by the petitioners does not constitute an "impost or duty," then only the commerce clause of the Federal Constitution could offer any possible restriction on its collection. The commerce clause (Article I, Section 8) grants to Congress the power "to regulate commerce with foreign nations and among the several states, and with the Indian tribes." It is now clear that the suggestion made in *Brown v. Maryland*, 12 Wheat. 419, to the effect that the commerce clause prohibits state taxa-

tion on goods remaining in the original package after being imported either from a foreign nation or from another state has been completely overthrown, at least insofar as interstate commerce is concerned.

*License Cases*, 5 How. 504, 12 L. ed. 256;

*American Steel & Wire Co. v. Speed*, 192 U.S. 500, 48 L. ed. 538;

*General Oil Co. v. Crain*, 209 U.S. 211, 52 L. ed. 754;

*Bowman v. Continental Oil Co.*, 256 U.S. 642, 65 L. ed. 1139;

*Eastern Air Transport v. South Carolina Tax Commission*, 285 U.S. 147, 76 L. ed. 673;

*Baldwin v. Seelig*, 294 U.S. 511, 79 L. ed. 1032.

In the last cited case Justice Cardoza deprived the original package doctrine, so far as it related to interstate commerce, of all force and efficacy as a principle of substantive law, when he said:

> "The test of the 'original package,' which came into our law with *Brown v. Maryland*, 12 Wheat. 419, 6 L. ed. 678, is not inflexible and final for the transactions of interstate commerce, whatever may be its validity for commerce with other countries, Cf. *Woodruff v. Parham*, 8 Wall. 123, 19 L. ed. 382, *supra; Anglo-Chilean Nitrate Sales Corp. v. Alabama*, 288 U.S. 218, 226, 77 L. ed. 710, 714, 53 S. Ct. 373, ..... A.L.R. ..... There are purposes for which merchandise, transported from another state, will be treated as a part of the general mass of property at the state of destination though still in the original containers. *This is so, for illustration, where merchandise*

*so contained is subjected to a non-discriminatory property tax which it bears equally with other merchandise produced within the state. Sonneborn Bros. v. Cureton* (*Sonneborn Bros. v. Keeling*) 262 U.S. 506, 67 L. ed. 1095, 43 S. Ct. 643; *Texas Co. v. Brown*, 258 U.S. 466, 475, 66 L. ed. 721, 726, 42 S. Ct. 375; *American Steel & Wire Co. v. Speed*, 192 U.S. 500, 48 L. ed. 538, 24 S. Ct. 365. There are other purposes for which the same merchandise will have the benefit of the protection appropriate to interstate commerce, though the original packages have been broken and the contents sub-divided. 'A state tax upon merchandise brought in from another State, or upon its sales, *whether in original packages or not*, after it has reached its destination and is in a state of rest, is lawful only when the tax is not discriminating in its incidence against the merchandise, because of its origin in another State.' (Citing cases) *In brief, the test of the original package is not an ultimate principle. It is an illustration of a principle. Pennsylvania Gas Co. v. Public Service Commission*, 225 N.Y. 397, 403, 122 N.E. 260, P.U.R. 1919C, 663. It marks a convenient boundary and one sufficiently precise save in exceptional conditions. What is ultimate is the principle that one state in its dealing with another may not place itself in a position of economic isolation. Formulas and catchwords are subordinate to this over-mastering requirement. Neither the power to tax nor the police power may be used by the state of destination with the aim and effect of establishing an economic barrier against competition with the products of another state or the labor of its residents. Restrictions so contrived are an unreasonable clog *upon the mobility of commerce.* They

> set up what is equivalent to a rampart of customs duties designed to neutralize advantages belonging to the place of origin. They are thus hostile in conception as well as burdensome in result. *The form of the packages in such circumstances is immaterial, whether they are original or broken.* The importer must be free from imposts framed for the very purpose of suppressing competition from without and leading inescapably to the suppression so intended." (Italics ours)

In the *License Cases*, 5 How. 504, 12 L. ed. 256, the Justices wrote six separate opinions. The opinion of Justice Daniel was devoted principally to the "original package" doctrine, and the logic of what he said seems particularly applicable to the case at bar. The opinion reads in part:

> "The doctrines which to me appear to have been gratuitously brought into this case are those which have been promulged in the reasoning of this court in the case of *Brown v. The State of Maryland*, reported in 12 Wheaton 419 —doctrines (and I speak it with all due respect) which I conceive cannot, by correct induction, be derived from the constitution, nor even from the grounds assumed for their foundation in the reasoning of the court in that case; but which, on the contrary, appear to be wholly illogical and arbitrary. The doctrines adverted to are these. That under the operation of that provision in the Constitution which confers on Congress the power of regulating commerce with foreign nations, etc., etc., and by the further provision which prohibits to the States the power of levying imposts or duties on imports, merchandise, or property imported from abroad — however completely its

transit may have been ended, however completely it shall have passed beyond all agencies and obligations in reference to the Federal government, and however absolutely, exclusively, and undeniably, it shall have become the property, and passed into the possession, of the citizen resident within the State, and protected both in person and property by the laws of the State—shall never become subject to taxation, in common with other property of the same citizen, whilst it shall remain in the bale, package, or form in which it shall have been imported, nor until (to use the language of the court) it shall have been 'broken up and mingled with the general mass of property.'

"With regard to this phrase, 'broken up and mingled with the mass of property,' so often appealed to with a view to illustration, it may be worth while to remark, in passing, how often words introduced for the purpose of explanation are themselves the means of creating doubt or ambiguity! With respect to the phrase above mentioned, it may be retorted, that a person may import a steam engine, a piano, a telescope, or a horse, and many other subjects, which could not be broken up in order to be mingled with the general mass of property. If, then, this phrase is to be apprehended as signifying (and this alone seems its reasonable meaning), *the appropriation of a subject imported in absolute private right and enjoyment*, either positively or relatively, *it surrenders the whole matter in dispute*, and admits that all the property of the citizen, who is himself protected in his person and in the enjoyment of his property, *is bound to contribute to the support of the government*

*which yields this protection, whether he shall have imported that property*, or purchased it at home." (Italics ours)

Since the original package doctrine is no longer a conclusive test of interstate commerce, it should be discarded as a conclusive test of foreign commerce. The commerce clause (Article I, Section 8), granting power to "regulate commerce with foreign nations and among the several states" cannot logically be construed to mean one thing when applied to commerce with foreign nations, and another thing when applied to commerce between the states.

Judge Steinert of the Washington Supreme Court sums up the position of petitioners on this point when he says:

"It seems to me that to apply the 'original package' doctrine as the sole test of taxability of property is to make a fetish of a formula. The real test of the validity of a state (fol. 53) tax is not whether the property sought to be taxed retains its original wrappings, but whether, in fact, the tax imposed actually restrains or interferes with commerce. It seems to me that where an article of merchandise has reached its destination, has exhausted its intended mobility, is being held by the owner for actual use in his business, just as he holds other property in the same business, and when such property is under the protection of the state laws, it ceases to be an import and becomes a part of the general mass of property within the state and as such is subject to the state's taxing power.

" 'Where property has come to rest within a State, being held there at the pleasure of the

owner, for disposal or use, so that he may dispose of it either within the State, or for shipment elsewhere, as his interest dictates, it is deemed to be a part of the general mass of property within the State and is thus subject to its taxing power.' *Minnesota v. Blasius*, 290 U.S. 1, 78 L. ed. 131." (R. 41, 42)

## CONCLUSION

Considerable confusion exists as to the status of the "original package" doctrine. As originally conceived, it was to apply to both interstate and foreign commerce. It was to be a final line of demarcation between tax liability and immunity. It has been overthrown so far as interstate commerce goes, and grave doubt cast upon its application to foreign imports by such remarks as Justice Cardozo's in *Baldwin v. Seelig, supra*, that the doctrine "is not inflexible and final for the transactions of interstate commerce, whatever may be its validity for commerce with other countries * * *." The precise use of words was a lifetime habit with Justice Cardozo, and had he intended to reaffirm the doctrine so far as it affects foreign commerce, the language probably would have been, "The test of the original package is inflexible and final for transactions of foreign commerce." But instead, he chose to say, "whatever may be its validity for commerce with other countries."

Furthermore, we think it evident that a nondiscriminatory state property tax should not be considered an "impost or duty" within the meaning of Article I, Section 10 of the Constitution.

A careful examination of the Federal Constitution reveals that its framers used the words "imposts or duties" in a different sense than they used the words "taxes and excises." In the true sense intended by the framers of the Constitution an "impost or duty" is a charge upon the right to bring goods into a particular state. The words do not include a property tax borne equally by all of the property receiving the protection of the laws of the state.

It is submitted that the petition for a writ of certiorari should be granted.

Respectfully submitted,

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